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WASHINGTON, D. C. 20543

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In the Supreme Court of the United States

OCTOBER TERM, 1976

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE AND COMMONWEALTH EDISON COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NIAGARA MOHAWK POWER CORPORATION, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK AND ROCHESTER GAS AND ELECTRIC CORPORATION

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In accordance with this Court's Rule 42, Edison Electric Institute, *et al.*, have received the written consents of counsel for all parties to file this brief as *amici curiae*. Copies of the consents have been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Edison Electric Institute ("EEI"), and Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, Omaha Public Power District, Power Authority of the State of New York, and Rochester Gas and Electric Corporation ("the Utilities") have an interest in this Court's disposition of the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976), *cert. granted sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-419).[1] This interest is demonstrated by the participation by EEI and the Utilities in the rulemaking proceeding before the Atomic Energy Commission[2] reviewed by the court of appeals in the aforementioned opinion, by the participation of the Utilities as *amici curiae* in that review by the court of appeals,[3] by the participation of EEI and the Utilities as *amici curiae* in this Court's consideration of the petition, and by the status of the Utilities and many of

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[1] The slipsheet copy of the opinion is set out at the Appendix to the Petitioners' Briefs ("Pet. App.") 28-88.

[2] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Letter from Arvin E. Upton, Esq., transmitting Written Comments of Alabama Power Company, *et al.* (January 15, 1973); Oral Comments of Arvin E. Upton, Esq., Tr. 12-14, 35, 46-47 (January 17, 1973); Supplementary Written Statement of Alabama Power Co., *et al.* (March 19, 1973).

[3] Brief of *Amici Curiae*, Commonwealth Edison Company, *et al.*, No. 74-1586 (filed D.C.Cir. Dec. 27, 1974) (Pet. App. 8).

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EEI's members as licensees and applicants for licenses for nuclear power plants.

EEI is the principal national association of electric utility companies. Its members serve 99.1% of all customers of the investor-owned segment of the electric utility industry and 77.1% of the Nation's electricity users. These member companies are licensees or applicants for licenses for 178 of the 205 commercial nuclear power units currently licensed by, or in licensing before, the Commission.[4] Among EEI's interests are the development of sound policies and procedures for regulation of the construction of nuclear power plants and the production and generation of electricity through the use of nuclear power.

The Utilities include investor-owned and public entities that construct and operate power plants to provide electricity to their customers. Each of the Utilities has an interest in one or more nuclear power plants licensed by, or for which license applications are pending before, the Commission.[5] The Utilities collectively have invested billions of dollars in those plants.[6]

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[4] USNRC, FACILITIES LICENSE APPLICATION RECORD (September 30, 1976). The term "the Commission" is used herein to refer to both the U.S. Atomic Energy Commission ("AEC") and the agency that succeeded to its regulatory responsibilities on January 19, 1975, the U.S. Nuclear Regulatory Commission ("NRC"). 42 U.S.C. §§ 2011-2282 (1970 & Supp. V 1975); Pub. L. No. 93-438, 88 Stat. 1233 (codified in scattered sections of 5, 40, 42 U.S.C.); Exec. Order No. 11,834, 3A C.F.R. 111 (1975), *reprinted in* 42 U.S.C. § 5801 app., at 3666 (Supp. V 1975).

[5] The Utilities hold operating licenses for fourteen nuclear power units (9,075 megawatts ("MWe")), construction permits for seven units (7,736 MWe), and have applications in earlier stages of licensing review for three units (3,477 MWe).

[6] At an estimated value of $680 per kilowatt, the Utilities' nuclear power units represent an investment of approximately $14 billion

SIGNIFICANCE OF THE DECISION BELOW

The court of appeals set aside and remanded the Commission's rule [7] quantifying fuel cycle environmental impacts due to alleged failings in the treatment of certain indirect or secondary environmental impacts of reactor operation, namely, radioactive waste disposal and reprocessing. The lower court also remanded the full-term operating license of the petitioner, Vermont Yankee Nuclear Power Corporation, to await the outcome of further proceedings in the rulemaking.[8] If this decision is allowed to stand, it will have serious consequences by subjecting the Commission and other agencies to an unknowable procedural burden, to an unparalleled[9] requirement for substantive precision in predicting the future, and to a Donnean [9] requirement of breadth in environmental statements. Agency caution would be sure to convert each and every one of these into delays. In combination, the result may approach paralysis. Such delays will have an impact not only on those entities directly involved in nuclear power plant licensing procedures before the Commission, but also on consumers of electricity throughout the country.

BACKGROUND

During the proceedings to determine whether to issue an operating license for the Vermont Yankee

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in 1974 dollars. See USAEC, THE NUCLEAR INDUSTRY 1974, WASH 1174-74 (1974), Table 2-2.

[7] Pet. App. 71.

[8] Pet. App. 40.

[9] JOHN DONNE, DEVOTIONS XVII (1623).

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Nuclear Power Station, an intervenor raised the question whether certain environmental impacts associated with the reactor's fuel, but which occur away from the plant site in separately licensed activities, should be part of the Commission's environmental analysis of the power plant pursuant to the National Environmental Policy Act of 1969, as amended ("NEPA").[10]

The Commission's Atomic Safety and Licensing Appeal Board concluded on June 6, 1972, that some such environmental costs should be included but that others should not be included.[11] In particular, the Appeal Board decided to include the impacts of transportation of spent fuel, low-level wastes, and high-level wastes from the reactor to their respective destinations in the cost-benefit analysis of the reactor, but to exclude the environmental impacts of a reprocessing plant and waste disposal facilities. Pet. App. 115.

Five months later the Commission initiated the rulemaking that is the subject of the opinion below. 37 Fed. Reg. 24,191 (1972) (Pet. App. 352). In its notice, the Commission recognized that, in several licensing proceedings, intervenors had raised the question whether the environmental effects of distinct and geographically unrelated activities which comprise the uranium fuel cycle[12] should be included in the cost-benefit an-

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[10] 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975); *see* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

[11] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 4 AEC 930 (ALAB 1972) (Pet. App. 112-29); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 7 AEC 159 (ALAB 1974) (Pet. App. 130-72).

[12] These activities cover, in industrial sequence, mining of uranium ore, extraction of triuranium octoxide (U_3O_8) from that ore

alysis of each reactor. The Commission went on to state that it was considering a rule to amend its regulations on environmental matters in one of two ways.[13] The first alternative was to exclude the consideration of these fuel cycle activities on the basis that a reactor's annual share of the environmental impacts of the supporting activities is "sufficiently small as not to affect significantly" the decision whether to approve construction and operation of the reactor. Pet. App. 356. The second alternative was to include a calculation of normalized [14] impacts in the environmental statement

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in the milling process, conversion of the U_3O_8 to a gas (uranium hexafluoride or UF_6), enrichment (concentration) of the U_{235} contained therein from its natural concentration (approximately 0.711 percent) to approximately 2-4 percent, and then its fabrication as fuel by a) re-conversion into the solid uranium dioxide (UO_2), b) pelletization, and c) insertion into fuel rods for use in the reactor. After the fuel is used in the reactor it may be stored permanently, or reprocessed for the reuse of part and the storage of the remainder.

[13] The participants in the rulemaking were not forbidden from presenting other alternatives. A third alternative was presented and rejected by the Commission. Pet. App. 389-90.

[14] The concept of "normalization" is important to an understanding of the rulemaking. With respect to both the scale and processes of the reactor and the fuel cycle activities, the Commission chose characteristics which were representative of the present industry to emphasize the most severe impact. This results in a conservative (or high) estimate of the overall impact.

An example of this approach is the choice of shorter useful lives for various activities than experience would indicate. This factor alone exaggerates the fixed environmental costs. For example, the land use for each of the supporting activities (except waste management where the commitment was permanent) was exaggerated by estimating a useful life of only 20 years. USAEC, ENVIRONMENTAL SURVEY OF THE NUCLEAR FUEL CYCLE (November 1972) ("Original Environmental Survey") S-1 to S-48 (Pet. App. 539-80); USAEC, ENVIRONMENTAL SURVEY OF THE URANIUM FUEL

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on each reactor. That normalized statement of numerical values would cover the various environmental impacts of conducting all the fuel cycle activities which occur beyond the power reactor site boundary. The proposed impact table also would put those numbers in perspective by comparison with the impacts of other more familiar activities, such as coal plants, natural background radiation, and the reactor itself.[15] Pet. App. 358. The technical basis for both alternatives, the 310 page double-spaced Original Environmental Survey, was published at the same time, as the rulemaking notice.

To receive comments on the proposed rule, the Commission appointed a three-member hearing board.[16] All interested persons were invited to submit oral and/or written statements at a legislative "rather than an adjudicatory" hearing to begin on February 1, 1973. Pet. App. 359. The initial written comments were requested by January 14, 1973. Pet. App. 359.

The Commission later issued further procedural instructions directing that the hearing should be "conducted as informally and as expeditiously as practicable, consistent with affording the participants a rea-

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CYCLE, WASH-1248 (1974) ("Final Environmental Survey") S-1 to S-33 (Pet. App. 1200-43). As the Commission said in its decision, these calculations were only intended to be descriptive in generating conservative terms and were not intended to be actual costs for any particular reactor and were not intended to set licensing limits. Pet. App. 396.

[15] This comparative approach is in line with the Council on Environmental Quality's Guidelines ("CEQ Guidelines") on the preparation of environmental impact statements, 40 C.F.R. Part 1500 (1976).

[16] The board was appointed by notice at 38 Fed. Reg. 49 (1973) (Pet. App. 361-63).

sonable opportunity to present their positions." Pet. App. 362. In addition, the Commission said that both oral and written statements would be "subject to questioning" by the board. *Id.* The board was empowered to hold one or more procedural planning sessions; such a session was held on January 17, 1973. Then the board was to hold an oral hearing and, after allowing thirty days further for the submission of supplementary written statements, the board was to forward the entire record to the Commission accompanied by an identification of the issues but without any recommendation or initial decision from the board. The Commission itself would make the decision. Pet. App. 363. The oral hearing was held on February 1 and 2, 1973; all parties were allowed the full time for oral presentation which they requested.[17]

The respondents in this Court requested, and were granted, an extension of time in which to file their supplemental written statement.[18] On July 6, 1973, the board forwarded the record and its report identifying nine issues to be considered by the Commission. Pet. App. 364-78.

On April 16, 1974, the Commission issued the final rule accompanied by a 260 page single-spaced Final Environmental Survey to take account of information made available during the rulemaking. 39 Fed. Reg. 14,188 (1974) (Pet. App. 385-99). The Commission briefly discussed all issues identified by the board and

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[17] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Tr. 9-26 (Jan. 17, 1973).

[18] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Motion of Consolidated National Intervenors/Union of Concerned Scientists in Request of Schedule Rearrangement (Feb. 27, 1973) and Order Granting Extension of Time (Mar. 9, 1973).

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concluded that, although the sum of these fuel cycle costs is "relatively insignificant" in the consideration of whether to license a power reactor, it would adopt the second alternative because "it quantifies, to the fullest extent practicable, the environmental effects of the uranium fuel cycle in individual cost-benefit analyses." Pet. App. 395-96.

The respondents in this Court filed a petition for review of the final rule in the court of appeals on June 7, 1974. That proceeding was consolidated with the petition for review of the Vermont Yankee license, and oral argument was held May 27, 1975. The decision below, which is the subject of the writ of certiorari, issued July 21, 1976.

SUMMARY OF ARGUMENT

The initial question before the Court is whether the Commission was correct in excluding fuel cycle impacts from the NEPA consideration of the Vermont Yankee operating license. The *amici* suggest that the Commission was correct since those impacts occur at facilities geographically distant from the reactor, separately licensed by the Commission at different times, and require separate NEPA statements in accordance with the licensing scheme of the Atomic Energy Act.

However, if the Commission was not free for those reasons to exclude fuel cycle impacts as a matter of law, the subsequent rulemaking provided an appropriate basis for excluding those impacts as insignificant in the NEPA consideration of a power reactor license. The rulemaking record was substantively adequate for this determination due to the full consideration of available information by the Commission in an exercise of its technical expertise. The legislative procedures used in that rulemaking were also adequate for the determination of such facts for such a purpose, and adjudicatory procedures would have been inappropriate.

ARGUMENT

I. THE COMMISSION WAS CORRECT IN DECIDING TO EXCLUDE FUEL CYCLE IMPACTS FROM THE NEPA CONSIDERATION OF THE VERMONT YANKEE OPERATING LICENSE.

The Commission's Atomic Safety and Licensing Appeal Board concluded on June 6, 1972, that the impacts of transportation of spent fuel, low-level wastes, and high-level wastes from the reactor to their respective destinations should be included in the cost-benefit analysis of the reactor, but the environmental impacts

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of a reprocessing plant and waste disposal facilities should be excluded. Pet. App. 115. The court below disagreed; it decided that the environmental impacts of all fuel cycle facilities must be included. Pet. App. 33-40.

Thus, this Court is presented with the question whether the decision to license a particular reactor is related to the decision to license fuel cycle facilities[19] so intimately, necessarily, and definably that the fuel cycle activities are part of the same major Federal action and, therefore, need to be considered in the NEPA statement on each reactor. The statutory and regulatory structure for licensing, the advice of the CEQ, and this Court's prior decisions all dictate a negative answer to this question.

The Commission's authority to issue licenses was established under the Atomic Energy Act of 1954, as amended ("Atomic Energy Act"). 42 U.S.C. §§ 2011-2282 (1970 & Supp. V 1975). That authority is stated separately according to whether the applicant for a license seeks to possess and use source material, by-product material, special nuclear material, or a utilization or production facility.[20] 42 U.S.C. §§ 2091-99, 2111-

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[19] Fuel cycle facilities are those which mine, mill, convert, enrich and fabricate uranium for use as fuel, in the reactor as well as these facilities which may reprocess that uranium and/or store it after use in the reactor. *See also* note 12, *supra*.

[20] In the Energy Reorganization Act of 1974, Congress established a specific requirement for the licensing of the Federal long-term storage of high-level radioactive waste activities and recognized that such long-term storage facilities do not exist. 42 U.S.C. §§ 5842(3) and (4) (Supp. V 1975); H.R. REP. No. 93-1445, 93d Cong., 2d Sess. 34 (1974). There was no hint that power reactor licensing or any other licensing should in any way be dependent on these separate licensing activities for long-term high-level waste management activities.

12, 2061-78, 2131-40 (1970 & Supp. V 1975); 10 C.F.R. Chapter I (1977). The Atomic Energy Act also recognizes that a particular activity may require a license covering more than one of these conceptual categories. 42 U.S.C. § 2201(h) (1970). However, in each case, the findings to be made relate to the activity or activities for which the license is sought and the Commission makes its determination whether to issue the license on the basis of the information in the application for that license as required by statute. *E.g., Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961); 10 C.F.R. § 50.57 (1977).

The Commission's regulations governing the preparation of NEPA statements demonstrate that the licensing of each type of fuel cycle activity is considered a major Federal action and therefore an impact statement will be prepared. 10 C.F.R. § 51.5 (1977).

The scope of consideration in each of those NEPA statements should be coterminous with the scope of the individual license. *Friends of the Earth v. Coleman*, 513 F.2d 295, 300 (9th Cir. 1975).

This Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 300 (1976), confirms that approach. In that decision, the Court found that it was appropriate to have environmental impact statements for individualized "local actions" distinct from any statement that would be required for a "new national coal leasing program." 427 U.S. at 399-400. In this case, the major Federal action is an individual local one, namely, the licensing of a single nuclear power plant, Vermont Yankee Nuclear Power Station. The Court in *Kleppe* recognized that such individual actions are subject to separate NEPA statements, regardless of the timing or

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existence of a statement of larger scope. 427 U.S. at 414 n.26.

The Atomic Energy Act's directive to license private nuclear activities does not require an environmental statement. While the national coal program is a new program authorized by the Executive Branch in the post-NEPA period, the licensing of the nuclear fuel cycle activities, including nuclear power reactors, was established by Congress prior to NEPA and this scheme of license by license consideration has been reaffirmed by Congress subsequent to NEPA.[21] It is only for Congress to reconsider this licensing scheme. As one of the counsel for certain respondents in this matter recognized in extensive testimony before Congress in 1974,

> [t]hese decisions on whether or not to go ahead with nuclear power, whether to have a breeder, whether nuclear waste disposal is such a problem that it cannot be dealt with and, therefore, in and of itself poisons the nuclear industry, are all *questions that have ultimately to be resolved by Congress.*

Nuclear Power Plant Siting and Licensing: Hearings on H.R.11957, H.R.12823, H.R.13484 and S.3179 before the Joint Comm. on Atomic Energy, 93rd Cong., 2d Sess. 77-140 (1974) (quoted material at 89; *accord,* 129) (emphasis added). The same witness, in recommending the establishment of a "blue ribbon panel" for debate on this and other issues, admitted in effect that the licensing of individual reactors did not provide a "forum" for this issue and that the issue was not appropriate to such individual reactor licensing actions. *Id.* at 95, 127-29.

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[21] Pub. L. No. 93-438, 88 Stat. 1233 (codified in scattered sections of 5, 40, 42 U.S.C.).

Since Congress established by statute this scheme of license by license consideration, the Court should find that the licensing of an individual power reactor is a separate major Federal action, distinct from those involved in the licensing of other fuel cycle activities and that, therefore, its environmental statement is properly limited to the proposed reactor's direct impacts and geographically related indirect impacts. *See Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 531 F.2d 637 (2d Cir. 1976), *on remand from Coleman v. Conservation Society of Southern Vermont, Inc.*, 423 U.S. 809 (1975), *vacating, Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974); 40 C.F.R. § 1500.8(a)(3) (1976).

This is not to say that Congress will lose the benefit of NEPA statements on the fuel cycle activities. *See* Pet. App. 38 n.15. The Commission has prepared NEPA statements for each major Federal action it takes, and its regulations assure that this process will continue.

This analysis is also consistent with the expansive advice of CEQ on the preparation of environmental impact statements, including the extent to which such statements should consider the indirect consequences of major Federal actions.[22] *See* 40 C.F.R. Part 1500 (1976). Those guidelines recognize that

> [S]econdary effects, through their impacts on existing community facilities and activities, through

[22] "[T]he CEQ guidelines are advisory, not mandatory. Greene County v. F.P.C., 455 F.2d 412 [421] (2d Cir., 1972)." Continental Ill. Nat. Bank & Trust Co. of Chicago v. Kleindienst, 382 F. Supp. 107, 114 (N.D. Ill. 1973); *accord*, Sierra Club v. Lynn, 503 F.2d 43, 58 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975); *compare* 42 U.S.C. § 4332 (2)(B) (1970) *with* 115 CONG. REC. S12,146 (daily ed. Oct. 8, 1969) (proposed version of that section).

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> inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant . . . and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, *of the area in question.*

40 C.F.R. § 1500.8(a)(3)(ii) (1976) (emphasis added). This guideline indicates that secondary impacts are those which are not direct but which are geographically related to the major Federal action under consideration. A review of the Commission's impact statements will demonstrate that they do in fact consider such secondary impacts.[23] However, not even the CEQ suggests that it is appropriate to consider tertiary impacts, that is, indirect impacts unrelated geographically, especially where they constitute separate major Federal actions and will, therefore, be subject to separate impact statements.

Not only are the other nuclear fuel cycle activities geographically unrelated to the power plant and subject to separate licensing actions requiring independent NEPA impact statements, but also they are proposed and acted on at distinct times, conducted by

[23] *E.g.*, NRC, FINAL ENVIRONMENTAL STATEMENT RELATED TO THE CONSTRUCTION OF MARBLE HILL NUCLEAR GENERATING STATION UNITS 1 AND 2, Public Service Company of Indiana, Inc., *et al.* (Docket Nos. STN 50-546, STN 50-547) (September 1976); *see* NRC, REGULATORY GUIDE 4.2, REVISION 1, PREPARATION OF ENVIRONMENTAL REPORTS FOR NUCLEAR POWER STATIONS (January 1975).

different persons, and subject to distinct technical and environmental requirements.

II. THE RULEMAKING DETERMINATION PROVIDED AN ADEQUATE FACTUAL BASIS FOR THE EXCLUSION OF FUEL CYCLE IMPACTS FROM THE NEPA CONSIDERATION OF INDIVIDUAL REACTOR LICENSES.

The inquiry made by the Commission in the rulemaking was an interstitial environmental assessment to determine whether the indirect impacts of the nuclear fuel cycle should be included in the cost-benefit balance and in the consideration of alternatives in the licensing of individual nuclear power reactors. *See* 40 C.F.R. § 1500.6 (1976); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); 42 U.S.C. § 4332(2)(C)(iii) (1970).

As discussed in greater detail below, the inquiry conducted by the Commission was procedurally and substantively adequate for that purpose and the Commission's conclusion that those fuel cycle impacts are "relatively insignificant" in the NEPA consideration of a reactor was correct. On that basis, the fuel cycle impacts could have been excluded. Pet. App. 395. If the Commission erred at all in its eagerness to fulfill the purposes of NEPA, it erred by including the quantification of its estimates in individual reactor environmental impact statements.

That quantification is now included in the cost-benefit balance for the reactor and thus affects the consideration of possible electric generation alternatives, with their fuel cycles.[24] However, the Commission did

[24] For example, the coal "fuel cycle" includes mining, removal of impurities prior to burning, burning, removal of particulates and sulphur dioxide during the burning process, disposal of ash and, if flue gas desulphurization devices are used, disposal of sludge.

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not attempt to state any of the *benefits* accruing from nuclear fuel cycle activities.[25] Nor did the Commission attempt to quantify the *costs* or *benefits* of the alternative fuel cycles. The Commission concluded that even a cost-benefit analysis so-tilted against the nuclear alternative would nonetheless be unlikely to change a decision otherwise favorable to the licensing of the nuclear power plant. *A fortiori,* inclusion of the benefits of the nuclear fuel cycle and consideration of the costs and benefits of alternative fuel cycles would, logically, reduce the already negligible significance of considering nuclear fuel cycle impacts to a point approaching zero. Perhaps it might even result in an analysis more favorable to the nuclear power plant.

To necessitate a NEPA statement, a Federal action must be a major one that is also significant in impact. If an agency through preliminary examination of a proposed action concludes that its impact is insignificant, a NEPA statement is unnecessary. In reaching a negative assessment of the impact, the agency must take a "hard look" at the proposed action, identify the areas of potential concern, and substantiate its conclusions of insignificance with a statement of its rationale discussing the elements considered. *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service,* 487 F.2d 1029 (D.C. Cir. 1973). The precise definition of significance has been left by Congress to the good faith of the agency involved. *Hanly v. Kleindienst,* 471 F.2d 823, 830 (2d Cir. 1972), *cert.*

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[25] Arguably, the benefits of the fuel cycle activities should also have been considered. *Cf.*, Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 426-27 (5th Cir. 1973). However, this possible failure was at most harmless error since consideration of the benefits would only have added weight to a decision already favorable to reactor licensing.

denied, 412 U.S. 908 (1973) ("*Hanly II*"). The reviewing courts have required that the impact of the action be insignificant relative to existing activities and that the impact not be "the straw that breaks the back of the environmental camel." 471 F.2d at 831.

The insignificance of the impact may be obvious, allowing almost conclusionary statements,[26] or it may require considerably more investigation and deliberation[27] before finally being accepted. In reviewing such investigations of impact, courts have recognized the agency's need for flexibility of procedure. The only standards have been functional: the agency is to consider all relevant issues and reach its decision in a manner permitting comprehension of its rationale.

By analogy, an agency should be able to exclude from a NEPA statement consideration of distant indirect impacts, at least where they are determined to be insignificant. Indeed, "it is entirely unreasonable to think that Congress intended for an impact statement to document every particle of knowledge that any agency might compile in considering the proposed action." *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974). The CEQ guidelines also support this position by requiring that indirect impacts need be considered only "if expected to be significant" in and of themselves. *See* 40 C.F.R. § 1500.8(a)(3)(ii) (1976) ("population and growth impacts"). The record of this proceeding satisfies the "hard look" rule and provides an adequate substan-

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[26] Hanly v. Mitchell, 460 F.2d 640, 645-46 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) ("*Hanly I*") (one page negative assessment sufficient for office building).

[27] *E.g.*, an assessment for a jail was remanded twice for additional consideration and examination. *Hanly I*; *Hanly II*; Hanly v. Kleindienst, 484 F.2d 448 (2d Cir. 1973).

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tive basis for the conclusion of "insignificance", as discussed within Argument III, *infra*.

III. THE BASIS IN THE RECORD FOR THE COMMISSION'S NEPA DESCRIPTION OF FUEL CYCLE IMPACTS IS ADEQUATE.

The court below found that the Original Environmental Survey alone would support the Commission's conclusions on the fuel cycle activities, other than the long-term storage of high-level radioactive waste and reprocessing, without resort to the oral and written testimony. Pet. App. 51-52.

With respect to the long-term storage of high-level radioactive wastes, the court of appeals devoted a major part of its opinion to a discussion of the lack of detailed information on the facilities and of the absence of a "genuine dialogue" or adversary debate about the "basic philosophical issues concerning man's ability to make commitments which will require stable social structure for unprecedented periods." Pet. App. 67, 63. The decision below also said that the Commission had inadequately articulated its reasoning and failed to specify the evidence on which it relied. Pet. App. 64. However, the principal specific criticism of the record was withdrawn by the court in its order of October 8, 1976, correcting the opinion. Pet. App. 87-88.

With respect to the alleged inadequacy of the Commission's findings on the impact of reprocessing, the decision below contains nothing but a conclusory statement of inadequacy.[27]

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[27] In Part III of the opinion below (which deals with the rulemaking), the court of appeals mentioned the word "reprocessing" seven times and gave only one hint why the treatment of reprocessing was deemed inadequate. Pet. App. 51 (twice), 55, 60 (twice),

These conclusions are inconsistent with this Court's directives on how a reviewing court should determine whether there is sufficient support in the record for an agency's decision. Further, the decision below places a burden on the Commission to provide information for NEPA consideration which is contrary to the interpretation of NEPA by the courts.

> The adequacy of an [impact statement] can only be considered in light of its purpose. "The primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices."

Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378, 386 (2d Cir. 1975), quoting *Monroe County Conservation Council v. Volpe,* 472 F.2d 693, 697 (2d Cir. 1972). Measured against this standard, the Commission's rulemaking is clearly adequate. The Commission based its final conclusions on the full rulemaking docket and on its expertise. *See Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures,* 422 U.S. 289, 320-21 (1975) ("*SCRAP II*"). The Commission's rulemaking decision has as its basis the 260 page single-spaced Final Environmental Survey, the written comments of 46 participants and the Regulatory Staff, the 520 page transcript of the oral proceedings, all documents ref-

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62, 68, and 71. In footnote 51, the opinion cites a government report issued one year *after* the final rule which stated that " 'there are still many technical problems and uncertainties in the overall area of reprocessing of spent fuel and properly managing its radioactive waste.' " Pet. App. 60. The fact that there are "technical problems and uncertainties" does not vitiate the ability of the Commission to make an adequate estimate of the environmental effects of reprocessing, on the basis of its experience, for the purpose of NEPA disclosure.

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erenced in the foregoing, the board's report to the Commission, and finally, the 4,000 word Statement of Consideration issued by the Commission with the final rule. These materials included supplementary information filed to correct the "deficiency," suggested by one board member, in the waste management discussion in the Original Environmental Survey.

In its Statement of Consideration, the Commission addressed all nine issues identified by the board in an adequate, if brief, fashion. Pet. App. 388-97. The opinion of this Court in *Camp v. Pitts*, 411 U.S. 138, 143 (1973), indicates that while the agency is required to state its rationale, that statement may even be "curt." The agency is not required to state its findings in the detail required of a trial judge sitting without a jury; rather the reviewing court is to survey the "administrative record" as a whole. 411 U.S. at 142.

The court of appeals has previously held that there is "some degree of flexibility and agency discretion in determining the content of impact statements." *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1091 (D.C. Cir. 1973) ("*SIPI*"), and that "[t]he statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible . . . ." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). Thus, the court of appeals in *SIPI* found that NEPA requires only "a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program." 481 F.2d at 1092. This Court emphasized those principles in *Kleppe*, 427 U.S. at 402 n.14, where it recognized that there must be "appropriate allowances for the inexactness of all predictive ventures." These decisions indi-

cate that it is appropriate to rely upon a lesser level of detail in the record for direct impacts of a project than the court below would require for indirect impacts stated in a normalized format.

As to the impacts of both reprocessing and long-term wastes attributable to a hypothetical reactor, the court below said that the "kind of detailed explanation and support for the staff's conclusions [for the other phases of the fuel cycle] was noticeably absent from the Environmental Survey *as originally published*." Pet. App. 51-52 (emphasis added). However, this ignores the true question: the sufficiency of detail in the Final Environmental Survey and the entire administrative record.[29] Further, the sufficiency of the record on these two fuel cycle activities should be judged in the light of the type of factual information available on reprocessing and long-term storage of high-level waste at that time. The court below has either ignored the present state of development or would require the presentation of detailed information despite the fact that no such information yet exists.

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[29] There was a considerable difference between the Original and Final Environmental Surveys in the degree of detail afforded the discussion of reprocessing and waste management. *Compare* Original Environmental Survey, Table S-3A and Chapters F and G (Pet. App. 538-625), *with* Final Environmental Survey, Table S-3A and Chapters F and G (Pet. App. 1194-1319). For example, in volume terms, the original devoted 58 double-spaced pages to the discussion of these subjects while the final had 61 single-spaced pages of discussion. And while, in the Original Environmental Survey, the Commission had discussed explicitly only its limited experience with the civilian nuclear fuel cycle, the Final Environmental Survey also discussed and relied on the more extensive experience in the Government's military reprocessing and waste management since the 1940's. *See* Final Environmental Survey, F-15 through F-19. *See* SCRAP II, 422 U.S. at 321.

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The lack of complete knowledge "does not necessarily undermine the adequacy of the statement." *Cady v. Morton,* 527 F.2d 786, 796 (9th Cir. 1975), *citing Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1280 (9th Cir. 1973). "If the court were to rule that the Defendants must perform all possible research on the environmental effects of [a project], the project could be postponed indefinitely, perhaps forever." *Brooks v. Volpe,* 350 F. Supp. 269 (W.D. Wash. 1972), *aff'd,* 487 F.2d 1344 (9th Cir. 1973).

Only one civilian reprocessing facility had ever operated (two were in the licensing process), and no permanent long-term high-level waste storage facility had been built. Pet. App. 36, 54-55. Thus, the conclusions of the staff witnesses and, ultimately, the Commission as to those two stages of the fuel cycle were necessarily based, to a great degree, on judgment and conceptual analysis. In contrast, there were 222 mines (Original Environmental Survey, B-7), two conversion plants with a total production of 10,000 metric tons per year (Original Environmental Survey, C-2), three enrichment plants that had operated for nearly 70 plant years [30] (Original Environmental Survey, D-1), and ten fuel fabrication plants (Original Environmental Survey, E-7).

In reaching its conclusions with respect to the impacts of reprocessing, the Commission relied on its experience with the operation of the one plant and the design and construction of the other two (Final Environmental Survey, Section F) (Pet. App. 1243-91), as well as the extensive experience since the 1940's with

[30] USAEC, AEC Gaseous Diffusion Plant Operations, (ORO-684) 11-13 (January 1972).

high-level wastes in the Government program, and gave only minimal credit for currently developing improvements in technology (Final Environmental Survey, S-2) (Pet. App. 1200-43). Further, the Commission took specific account of the respondents' criticisms of the reprocessing calculations in the Final Environmental Survey and recognized them in its Statement of Consideration. Pet. App. 393 n.3.

The Commission's estimate of the impacts of long-term high-level waste storage were perforce made on the basis of design concepts and analyses, but NEPA requires no more. The court below failed to recognize that the Commission was not considering the approval of a long-term waste storage facility, and thus the "factual predicate" necessary for detailed analysis was absent. *Cf., Kleppe,* 427 U.S. at 402; *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d at 837. Rather, the Commission was making descriptive estimates from experience with the storage of high-level wastes in the Government program, as well as at the only civilian reprocessing plant to have operated to date, and it relied on that experience. Pet. App. 393 n.3. Such wastes will be kept at the reprocessing plant until a long-term storage facility is constructed by the Energy Research and Development Administration and licensed by the Commission.[31] Until a definite design and location is proposed, one cannot determine answers to the questions about the details of high-level waste management posed by the court below.[32] Nor does NEPA require such answers. "Certainly NEPA does not require the Commission to

[31] The Commission's regulations currently require this approach. 10 C.F.R. Part 50, App. F (1977).

[32] *See* Kleppe v. Sierra Club, 427 U.S. at 401-02.

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forecast the deployment and effects of LMFBR power reactors in the year 2000 in the same detail or with the same degree of accuracy as another agency might have to forecast the increased traffic congestion likely to be caused by a proposed highway." *SIPI*, 481 F.2d at 1092. This Court recognized in *Kleppe*, 427 U.S. at 414, that "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." Such practical considerations also should be used to allow the agency discretion to determine the appropriate level of detail of consideration, especially where the subject requires "a high level of technical expertise." *See* 427 U.S. at 412. If specific details cannot yet be determined, the courts have allowed agencies greater leeway in EIS preparation. *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) (licensing of residential development in environmentally sensitive area); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974) (reactor licensing); *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975) (OCS oil leases). "NEPA does not require that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." *Sierra Club v. Lynn*, 502 F.2d at 61. "The preparation of such a statement necessarily calls for judgment, and that judgment is the agency's." *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974). *Cf. Kleppe*, 427 U.S. at 414.

The Commission and the Energy Research and Development Administration are currently pursuing their respective licensing and management responsibilities for high-level wastes and reprocessing. More

detailed environmental treatment will be accorded these subjects in those "more appropriate" proceedings. *See SCRAP II*, 422 U.S. at 322-28.

Congress has over the years held hearings to monitor carefully the continuing developments with respect to radioactive wastes, and in particular high-level wastes.[33] In 1959 alone, such hearings covered over 3000 pages.[34] Regularly those hearings have reviewed the progress of the Government's military waste management as well as licensing developments.[35] In considering the Energy Reorganization Act of 1974, Congress was told by at least one witness that "present nuclear power plant construction plans, which imply accumulation of more radioactive wastes, should be halted until a proven method for safely storing radioactive wastes is available." [36] However, the Chairman of the Commission submitted testimony that there was at least one "thoroughly proven, safe, flexible technique" already available and others were under development and consideration.[37] In the conclusion of

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[33] *Hearings on Chemical Reprocessing Plant before the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. (1963).

[34] *Hearings on Industrial Radioactive Waste before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. (1959) ("*1959 Hearings*").

[35] *1959 Hearings* 2509-31; *Hearings on Radioactive Waste Management before the Subcomm. on Environmental Safety of the Joint Comm. on Atomic Energy*, 94th Cong., 2d Sess. (1976).

[36] *Hearings on S.2744 before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess. 213 (1973).

[37] *Hearings on S.2135 and S.2744 before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. 338 (1974).

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this overview, the Chairman stated that there would be "high assurance that there is minimum hazard to future generations from these activities." Congress did not decide to halt power reactor licensing, but rather decided to require the Commission to license Federal long-term high-level commercial waste facilities which Congress recognized were not in existence and probably would not be until some future time "probably in the 1980's." S. REP. No. 93-980, 93d Cong., 2d Sess. 60 (1974).

Also in 1976, the Joint Committee on Atomic Energy issued a report which states as one of its "Conclusions" that, "on the whole, the potential difficulties which may be encountered in the radioactive waste management program do not pose risks to the public of such magnitude that this Nation should forego its nuclear energy program . . . ." AD HOC SUBCOMM. TO REVIEW THE LIQUID METAL FAST BREEDER REACTOR PROGRAM, REVIEW OF NATIONAL BREEDER REACTOR PROGRAM, 94th Cong., 2d Sess. 12, 79 (Joint Comm. Print 1976).

The estimate given by the Commission based on its expertise and experience with military and civilian high-level wastes was sufficient for the task at hand. *Industrial Union Department v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974); *cf. Kleppe*, 427 U.S. at 402 n.14. The Commission has had experience with the management of high-level wastes since the 1940's. The current inventory of high-level wastes from the Government programs is approximately 75.6 million gallons, or more than *ten times* the amount of such waste that will be generated by the entire civilian nuclear power industry by the year 2000. *ERDA Authorizing*

[39] *Id.*, at 347.

Legislation Fiscal Year 1977: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, Part 2, 94th Cong. 2d Sess., Chart VII at 1460, 1464 (1976).

It is to be hoped that the court of appeals is not correct in assuming that the assessment of environmental impacts must entertain philosophical debates as to whether our society will remain stable for 250,000 years. Pet. App. 63. Such an exercise would surely be a sally into the unforeseeable. *See SIPI*, 481 F.2d at 1092. The Commission satisfied NEPA when it described the radionuclides and other impacts, including the commitment of land as "permanent."[39] The court of appeals has approved a Commission rule which excludes considerations of war from the health and safety review of reactors. *Siegel v. AEC*, 400 F.2d 778, 784 (D.C. Cir. 1968). If the Commission can exclude from consideration such a drastic condition, which is nonetheless within our experience, in carrying out its basic health and safety responsibilities, it can surely decline to debate whether the Constitution will endure for 250,000 years.

IV. THE COMMISSION'S PROCEDURES WERE ADEQUATE FOR THE DETERMINATION TO BE MADE

The Commission initiated a rulemaking under Section 161 of the Atomic Energy Act to determine whether (a) the fuel cycle impacts "are sufficiently small as not to affect significantly" a power reactor's cost-benefit analysis and, therefore, may be excluded from consideration or (b) the fuel cycle impacts should be included in the Commission's NEPA statement according to Table S-3. 42 U.S.C. § 2201 (1970); Pet. App.

[39] *See* Table S-3 (Pet. App. 400).

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352-60. Pursuant to Section 181 of the Atomic Energy Act, such a rulemaking is subject to the requirements of the Administrative Procedure Act. 42 U.S.C. § 2231 (1970); 5 U.S.C. §§ 501-03, §§ 551-59, §§ 701-06 (1970 & Supp. V 1975). *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973).

The Commission, in its notice of rulemaking, announced that it would receive oral and written comments and that the hearing would be "legislative-type," not "adjudicatory." Pet. App. 359. In its Statement of Consideration accompanying the final rule, the Commission offered "further clarification": "Neither the effective amendment nor the Environmental Survey state or imply that the values in the Summary Table are to be imposed as operating limits on present and future fuel cycle facilities." Pet. App. 396. Thus the facts determined will not control the licensing of fuel cycle facilities and will not affect the likelihood of the grant or continuance of such licenses, or the cost of the design, construction, or operation of such facilities. The only effect of the instant rulemaking was to establish generalized legislative facts for the limited purpose of establishing part of the cost-benefit analysis in the Commission's NEPA statements for power reactors.

Given these facts, this Court must determine whether the procedures used by the Commission were adequate for this purpose. Some may urge that, since the Commission was indeed conducting no more than an interstitial environmental assessment, a rulemaking was entirely unnecessary and the Commission could have determined not to include the fuel cycle impacts without obtaining any public comment. *See* 10 C.F.R. § 51.7

(1977); *see also* 40 C.F.R. § 1500.6 (1976). Others may go to the opposite extreme by urging the Court to hold that adjudicatory procedures were required for this rulemaking. However, the Commission chose not to pursue the strictly internal method of determination and elaborate adjudicatory procedures were simply inappropriate to the task at hand.

The task at hand was the formulation of an expert judgment, for a limited purpose, of the average environmental impacts of eight different nuclear activities, given a variety of assumptions for the useful life and relative scale of plant, the annual fuel consumption of power reactors, and the available environmental protective devices applied in each activity. Especially in reprocessing and waste management activities, the assessment of these factors required the exercise of expert judgment rather than the precision in fact analysis sought by adjudicatory procedures. Clearly NEPA requires no special procedures but rather may be fulfilled through the normal procedures utilized by the agency in carrying out its substantive responsibilities. *Union of Concerned Scientists*, 499 F.2d at 1078-79. Nor is there anything unusual about an agency, especially one with "broad responsibility . . . free of close prescription" such as the Commission, relying on expert judgment in finding such normalized facts as the indirect impacts involved here, rather than insisting upon cross-examination before doing so. *See Siegel*, 400 F.2d at 783.

While the court below claimed that it did not "intrude on the agency's province by dictating to it which, if any, of [certain] procedural devices it must adopt to flesh out the record," it did so intrude by holding

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that an oral proceeding would be required on remand. Pet. App. 67, 69 n. 62. The opinion immediately reiterates that it does "not intimate that [the Commission] must adopt any of" the procedures set out in note 41, *infra*. However, this avails little in the face of the holding that oral proceedings are required.

In his "separate statement concurring in result," Judge Tamm wrote: "More procedure will not, in this case, guarantee a better record, and a better record can be generated without reopening the oral proceeding at this time." Pet. App. 80. In the "Opinion for the Court," Chief Judge Bazelon held:

> Evidently Judge Tamm would permit Dr. Pittman to supplement his testimony without giving those who disagree an opportunity to criticize or comment on the new material (*e.g.*, 'without reopening the oral procedings,' Concur at 3). *We would not agree.*

Pet. App. 69 n.62 (emphasis added). The conclusion that oral proceedings are necessary to the rulemaking rejects the flexibility accorded to agencies by Section 553 of the Administrative Procedure Act to have notice and comment procedures "with or without opportunity for oral presentations." 5 U.S.C. § 553(c) (Supp. V 1975).

This holding flatly usurps the discretion accorded the Commission under its own statute[40] and the Administrative Procedure Act,[41] which discretion has been recognized by the same court of appeals. *See, e.g., Siegel*, 400 F.2d at 783-86.

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[40] 42 U.S.C. § 2239(a) (1970).

[41] 5 U.S.C. § 553 (1970 & Supp. V 1975).

The opinion below did not stop there: it went on to enumerate most, if not all, of the significant procedural devices developed in the history of the common law [42] and concluded "[i]t may be that no combination of the procedures mentioned above will prove adequate, and *the agency will be required to develop new procedures* to accomplish the innovative task of implementing NEPA through rulemaking." Pet. App. 67 (emphasis added). This observation was coupled with the not entirely optimistic statement that the Commission's original procedures (notice with written and oral comment) "might suffice" if they were "administered in a more sensitive, deliberate manner." *Id.* The obsession of the United States Court of Appeals for the District of Columbia Circuit with "innovative" devices, or *ad hoc* procedures, has been criticized by many authorities. *See, e.g.*, DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 668 (1976); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974). If the court of appeals is allowed to continue down this path, it will erode, if not destroy, the utility of rulemaking as a regulatory tool.

The asserted basis for the procedural approach taken by the court of appeals in the decision below is a line of decisions in that circuit, *e.g., International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), and one decision of the Fourth Circuit, all of which

[42] The opinion below reads: "Many procedural devices for creating a genuine dialogue on these issues were available to the agency —including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees composed of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology." Pet. App. 67.

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require or approve "hybrid" rulemaking in the context of the statutes there in question. Pet. App. 43 n.23. This Court need not, however, consider whether the Commission sought to follow such procedures on paper but failed to administer them properly. Pet. App. 67-68 and n.59. Those so-called *International Harvester* procedures were developed in the context of particular statutes (which do not apply here) that required specific findings to be made in reaching individual decisions where, in some instances at least, there would be an individualized economic effect.[45] Thus, even if "hybrid" procedures were appropriate in those decisions on the basis of the particular statutes and perhaps on the basis of considerations of due process, such bases do not exist in this case. *See United States v. Florida East Coast Railway*, 410 U.S. at 244-46. Here, by contrast, the Commission's purpose was to develop, under its flexible rulemaking authority, a description of some of the indirect or secondary impacts to be included in the *Calvert Cliffs'* cost-benefit analysis[46] for individual reactors.

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[45] For example, the *International Harvester* decision relied on the four statutory considerations required for the Administrator's decision on an individual application for suspension. *International Harvester*, 478 F.2d 615, 623-24 (D.C. Cir. 1973). Two of these factors related directly to the acts of the applicant; they are not generalized factors. 42 U.S.C. § 1857f-1(b)(5)(D)(ii) and (iii) (1970). *See also*, Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) where the Court relied on two strict, but non-technological, statutory findings ("formal findings," 401 U.S. at 417) required of the Secretary. *See* Pet. App. 49 n.35 and associated text. These "limits of discretion" were not procedural, but rather substantive statutory requirements, which may make certain more rigorous procedures appropriate. They are distinct from the broad statutory findings required of, and accompanying procedural discretion vested in, the Commission in rulemaking. Siegel v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968).

[46] This concept of a cost-benefit analysis originated not in NEPA

Moreover, the procedures suggested by the court of appeals are wholly inappropriate to estimate the environmental impacts of a facility for the long-term storage of high-level wastes. Such a facility has never been constructed in this country. At the time of the rulemaking, the conceptual design stage had just been reached, as the decision below recognizes. Pet. App. 52-53. Thus, there were no engineering details concerning the precise environmental impacts of building and operating such a plant.[45] The court of appeals did not discuss reprocessing and waste management. In fact, the opinion below appears to find that the Original Environmental Survey was sufficient in itself to support "the staff's conclusions" without resort to the written comments, the oral proceedings, or the changes reflected in the Final Environmental Survey. Pet. App. 51.

Finally, the decision below indicates that the determination of normalized environmental impacts requires resort to special, but perhaps unknown, procedures due to the "innovative task of implementing NEPA through rulemaking." Pet. App. 67. To the contrary, NEPA requires no special procedures but rather may be fulfilled through the normal procedures utilized by the agency in carrying out its substantive responsibilities. *Union of Concerned Scientists,* 499 F.2d at 1078-79. Nor is there anything unusual about an agency, especially one with "broad responsibility . . . free of close prescription" such as the Commission, relying on expert judgment in finding such normalized facts

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but in the language of the *Calvert Cliffs'* opinion. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d at 1113. The *Calvert Cliffs'* interpretation of NEPA requirements is in doubt. *Cf., e.g., SCRAP II,* 422 U.S. at 321 n. 20.

[45] This is not the same as an absence of facts on the storage of wastes. See note 29, *supra.*

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as the indirect impacts involved here,[46] rather than insisting upon cross-examination before doing so.[47]

[46] Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968). This view of the special latitude afforded the Commission has been repeatedly cited by the courts of appeals. *See, e.g.*, BPI v. AEC, 502 F.2d 424, 428 n.3 (D.C. Cir. 1974).

[47] Assuming arguendo that the court of appeals was correct in finding the rulemaking procedures lacking and the amount of information inadequate, the majority below erred in applying Camp v. Pitts, 411 U.S. 138, 143 (1943). In that case the "vacating" of the "rule" did not change the *status quo:* The Comptroller of the Currency had denied Pitts the bank charter which he sought; the remand did not give Pitts that charter, but, at most, required that the matter be looked at again by the Comptroller "for further consideration."

The opinion below also relies on FPC v. Transcontinental Gas Pipe Line, 423 U.S. 326 (1976). In that case, the *status quo* was preserved effectively by the establishment of an escrow for the amount of money in dispute. *Id.* at 328, n.1.

That is precisely what Judge Tamm argued the court of appeals should have done here. To remand the rule without vacating it is not always an appropriate remedy, but it is in this case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the matter remanded to the court of appeals for entry of judgment denying the petitions for review.

Respectfully submitted,

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